Supreme Court, U.S.
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NO. 97-1878

In the Supreme Court of the United States

OCTOBER TERM, 1997

VICARI CONTRACTORS, INC.
Petitioner

VERSUS

PARISH OF JEFFERSON
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIFTH CIRCUIT, STATE OF LOUISIANA

A BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The Respondent the Parish of Jefferson, in accordance with Sup. Ct. R. 15, submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Vicari Contractors, Inc. In accordance with Sup. Ct. R. 15, ¶2, Respondent calls the Court's attention to a misstatement of fact in the Petition that bears on what issues are properly before the Court if certiorari were granted.

I. *THE COURT LACKS JURISDICTION*

Petitioner claims it raised *federal questions* in the appellate courts of the State of Louisiana. Petition for a Writ of Certiorari at 3. Petitioner claims jurisdiction is invoked pursuant to 28 U.S.C.A. §1257(a), which provides that final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari where the validity of a statute of any State is drawn into question on the grounds of its being repugnant to Constitution, treaties and laws of the United States, or where any title, right, privilege, or immunity is specially seet up or claimed under the constitution or Statutes of the United States. Petition for a Writ of Certiorari at 2. *Petitioner did not raise any federal claims in state court proceedings.*

Respondent attaches as an appendix Petitioner's Application for a Writ of Certiorari to the Louisiana Supreme Court. (A1-A48). Petitioner did not cite the Constitu-

tion, treaties or laws of the United States, or any right, privilege, or immunity under the United States Constitution or laws, as supportive of its position in the case. (A1-A48). The brief filed by Petitioner on appeal to the state Fifth Circuit was an exact duplicate of the writ application filed in the Louisiana Supreme Court. Further, at oral argument in the state Fifth Circuit Petitioner requested that the court *disregard* Petitioner's brief and consider "fairness and equity". *No federal questions were addressed by the state courts because Petitioner did not raise federal questions in the state courts.* The first reference in this case to the United States Constitution, Statutes, and Codes is the Petition for a Writ of Certiorari.

Petitioner claims it raised federal questions through "fact pleadings", citing paragraphs of its Petition for Damages. Petition for a Writ of Certiorari at 3. The cited paragraphs reflect no reference which could in the most liberal interpretation be said to raise with fair precision any federal claims. The allegations of the petition were insufficient to inform the state courts that they were presented with a federal claim. Moreover, on the first day of trial of this matter, Petitioner entered the following stipulation on the record:

> All claims stated in the Petitions against the Parish of Jefferson arising prior to the entering into the Consent Judgment on August 2, 1991 are dismissed and the Petition is amended to state that the action is for the wrongful enforcement of the agreement which was reached in open court on August 2, 1991. . .

Under Petitioner's stipulation the *only issue addressed*

was whether the Parish wrongfully enforced a consent judgment after Petitioner allegedly complied with its terms.

Federal preemption and supremacy clause issues now raised by Petitioner were neither raised nor addressed in the state courts. This Court has consistently held that, with very rare exceptions, in reviewing state court judgments it will not consider federal claims unless the federal claims were either addressed by or properly presented to the state court that rendered the decision to be reviewed. *Adams v. Robertson,* 117 S.Ct. 1028, 1029 (1997). When the state court is silent on a federal question, the Court assumes the issue is not properly presented, and the aggrieved party bears the burden of defeating that presumption. Id. at 1029. Petitioner concedes that the Louisiana state courts did not consider or pass on federal questions. Petition for a Writ of Certiorari at 3. Petitioner does not, *indeed cannot,* show that the issues were properly presented to the state courts.

The state court briefs and record show that federal questions were not presented in the state courts. (A1-A48). Petitioner does not demonstrate compliance with state rules for raising federal claims before the state courts, nor has Petitioner explained why the failure to comply with those rules would not be an adequate and independent ground for the state court to disregard the claims. *Adams,* 117 S.Ct. at 1030. Petitioner does not establish that it presented federal claims "with fair precision and in due time". Id. at 1030. The federal claims were not asserted until the Petition for Writ of Certiorari. Under the circumstances it was reasonable for the state courts to conclude no federal claims were before them. Id. at 1031.

Because petitioner failed to carry its burden of showing federal claims now raised were properly presented to the state courts, this Court cannot reach the question presented. Id. at 1028. This Court need not decide whether the requirement that a federal claim be addressed or properly presented in state court is jurisdictional or prudential, because even treating the rule as prudential, the circumstances here justify no exception. Id. at 1031. Nevertheless, Respondent respectfully suggests that, in accordance with *Webb v. Webb,* 451 US 493, 496, 101 S.Ct. 1889, 1991, 68 L.Ed. 2d 392 (1981), the Court is without jurisdiction in this case because federal questions were not raised in the state court proceedings.

II. *WRIT GRANT CONSIDERATIONS ARE NOT PRESENT*

Sup. Ct. R. 10 sets forth criteria which indicate the character of reasons the Court considers in deciding whether to grant certiorari: a) the existence of conflicting decisions between United States courts of appeals on the same important matter; b) the state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeals; c) a state court or United States court of appeals has decided an important question of federal law that has not been but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

None of the Sup. Ct. R. 10 writ grant considerations exist in the present case. No conflicting decisions by United States courts of appeals are cited. The state courts have not decided *any* questions of federal law. Petitioner does not point

out any question of federal law that has not been but should be settled by this Court. In addition to the absence of jurisdiction, the absence of writ grant considerations dictates that this Court deny the Petition for a Writ of Certiorari.

III. *THE CONTROVERSY DOES NOT ARISE UNDER FEDERAL LAW*

Petitioner claims this case "concerns the Section 8 Certificate Program, . . . established pursuant to Section 8 of the National Housing Act of 1937". Petition for Writ of Certiorari at 3. This is a misstatement of fact. By Petitioner's own stipulation the only issue in the trial court was whether Respondent wrongfully enforced a consent judment because Petitioner allegedly complied with its terms. A recitation of facts with reference to *record* evidence compellingly demonstrates the National Housing Act is not implicated.

In 1989 Petitioner purchased twelve vacant four-plex buildings on Mary Poppins Drive in Harvey, Louisiana, an area notorious for drug activity in abandoned and blighted buildings. The Sheriff's Office responded to *hundreds* of service calls at the buildings. The buildings were in such poor condition that $1.5 million dollars worth of renovations were needed. Many units had fire damage and were missing doors and windows. Petitioner was unable to secure financing for renovations. In April 1991 the property remained in a derelict condition.

The Respondent enacted a Dangerous Building Ordinance to protect the health, safety and welfare of the general public by establishing a requirement that structures which were vacant, unsecured, and unrepaired be secured

and repaired by the owner, at the risk of demolition if the owner failed to comply. Petition for a Writ of Certiorari, 22a-47a. Economic decline had caused the incidents of vacant, open structures to increase significantly. Id. at 23a. Derelicts, criminals, and vagrants habitually used such structures as hideouts. Id. at 22a. The respondent was compelled to provide a means of forcing owners to abate the hazards or to bear costs incurred by the Respondent in abating the hazards.

In April 1991 the Respondent investigated complaints with respect to Petitoner's buildings. The buildings were open to entry by vagrants; exteriors and interiors had fire damage; and junk, trash and debris were scattered through the interiors. Photographs graphically depict the dilapidated state of the buildings. The buildings were inspected by inspector Thibodaux of Harvey Volunteer Fire Co. No. 2. Inspector Thibodaux determined the buildings were fire hazards because they were full of trash, open to entry by vandals and vagrants, and falling down, conditions conducive to arson fires. There had in fact been a series of fires in the buildings.

An administrative hearing took place with respect to the condition of the buildings. Peter G. Vicari was present on behalf of Petitioner. The Hearing Officer determined the buildings were dilapidated, substandard, unfit for human habitation, constituted a hazard to health, safety and welfare of the citizens, and were "dangerous buildings". Orders were issued giving Petitioner thirty (30) days to secure the buildings and obtain a permit and begin repairs, or obtain a demolition permit. The orders were served on Petitioner, who acknowledged receipt of the orders and advised that "we should start a total renovation project within the next

thirty days".

Petitioner failed to take action as promised. On July 25, 1991 Respondent notified Petitioner that demolition would commence the next day. Petitioner filed a Petition for a Writ of injunction to enjoin demolition. After appearing in court for a hearing on a preliminary injunction *Petitioner's attorney recited the terms of a settlement on the record.* Petitioner agreed that by August 24, 1991 it would secure all openings with plywood and remove all debris from the buildings. A representative of Petitioner was to be present on August 26, 1991 to allow inspection. Renovations were to begin by September 3, 1991. *Petitioner consented and agreed that upon its failure to comply with the provisions of the agreement the buildings would be demolished by the Respondent without further notice.* Petitioner did nothing to comply with the settlement agreement. Demolition commenced the week of September 25, 1991 and continued through February 4, 1992. Petitioner filed suit for damages four months later.

Petitioner had entered into an "Agreement to Enter into a Housing Assistance Payment Contract" (AHAP) with the Housing Authority of Jefferson Parish. (A49-A66). The effective date of the Agreement was May 30, 1991. (A49). The AHAP provided that if Petitioner completed rehabilitation of units in accordance with a work write-up, a Housing Assistance Program (HAP) contract would be executed. (A49). *Commencement of the work was to be no later than July 30, 1991.* (A50). Petitioner could not obtain financing for the renovations and thus was unable to commence renovations as required under the AHAP. The AHAP was cancelled by the Housing Authority of Jefferson Parish.

Petitioner filed a claim against HUD under the Tort Claims Act alleging the property was demolished as a result of HUD's negligence and unreasonable delays in approving project based Section 8 funding. Petitioner filed a Complaint against HUD in the United States District Court for the Eastern District of Louisiana wherein it alleged the buildings were demolished as a result of HUD's negligence in approving proposed rent schedules for the project. Petitioner's claims against HUD were dismissed on motion for summary judgment. The Fifth Circuit affirmed the dismissal of the claims against HUD. Claims with respect to the AHAP were not presented in the state court proceedings against Respondent and are not properly before this Court.

Even if raised in *this* litigation, the claims asserated by Petitioner do not involve a right or remedy created by federal law. *1610 Corporation v. Kemp,* 753 F. Supp. 1026, 1031 (D.Mass. 1991), held that the fact that an AHAP is subject to federal regulation or involves preprinted forms prescribed by HUD does not establish that interpretation and aspects of performance of the AHAP are governed by federal law or that controversy over its terms arises under federal law, such that there would be federal question jurisdiction. Although federal statutes and regulations may be implicated to some extent, the claims at the core require only an interpretation of contract rights. Id. There is no significant federal interest or policy in conflict with state law, nor is there a necessity to provide for federal uniformity in the interpretation of such contract rights. Id. *Interpretation of contractual obligations under an AHAP are governed by state law.* Id. Federal courts have no subject matter jurisdiction to hear such claims. Id.

This case did not involve the National Housing Act. Even if it had, the National Housing Act does not preempt local laws enacted for the protection of the health, safety, and welfare of the general public.

IV. *PREEMPTION UNDER THE SUPREMACY CLAUSE*

Petitioner suggests HUD's involvement in approving proposed rents for Petitioners project *once renovations were complete* brought the project under the auspices of the National Housing Act, and therefore state and local laws and ordinances *which in any way impact the project* are preempted by the Supremacy Clause of the United States Constitution. Petition for Writ of Certiorari at 12. Petitioner suggests local governing authorities have no right to enforce ordinances enacted for the protection of the public health, safety, and welfare as against Petitioner's property, because its *potential* contract with a local housing authority to provide Section 8 project based housing is a shield against compliance with health, safety, and sanitation codes. Id. This position is untenable.

The Supreme court has laid out a well-worn path in preemption cases. *California v. ARC America, Corp.*, ____ U.S. ____, ____, 109 S.Ct. 1661, 1665, 104 L.Ed. 2d 86 (1989). It must first be determined whether Congress stated expressly its intent to supercede state law through the enactment of the statute in question. Even in the absence of express preemptive language, Congress may legislate in a given area so comprehensively that federal law occupies an entire field, leaving no room for state regulation. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n.*, 461 U.S. 190, 204, 103 S.Ct. 1713,

1722, 75 L.Ed. 2d 752 (1983). Even when Congress does not occupy an entire field, state law is prempted when it actually conflicts with federal law. Such a conflict may occur when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes or object of Congress. *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 2d 581 (1941). The critical question is whether Congress intended that federal regulation supercede state law. *Louisiana Public Service Comm'n v. Federal Communications Comm'n.,* 476 U.S. 355, 369, 106 S.Ct. 1890, 1899, 90 L.Ed. 2d 369 (1986).

Preemption may not be inferred from every Congressional enactment that overlaps state regulation. Courts must start with the assumption that the historic police powers of the states are not to be superceded by a federal statute unless that was the clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 2d 1447 (1947). The presumption against preemption applies to state or local regulations on matters of health and safety. *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 715, 105 S.Ct. 2371, 2376, 85 L.Ed. 2d 714 (1985). Only *actual* conflicts between state and fedearal law are of concern; the existence of a hypothetical or potential conflict is insufficient to warrant preemption. *Rice v. Norman Williams Co.,* 458 U.S. 654, 659, 102 S.Ct. 3294, 3299, 73 L.Ed. 2d 1042 (1982).

V. *THE HOUSING ACT OF 1937 DOES NOT PREEMPT LOCAL BUILDING ORDINANCES*

The United States Housing Act of 1937, 50 Stat. 888,

as amended, 42 U.S.C. §1401 et seq., established a federal housing agency authorized to make loans and grants to state agencies for slum clearance and low rent housing projects. *James v. Valtierra,* 402 US 137, 138, 91 S.Ct. 1331, 1332 (1971). The Act assists the several States and their political subdivisions to remedy unsafe and unsanitary housing conditions and the shortage of decent, safe, and sanitary dwellings for families of lower income. 42 U.S.C. §1437. The Act authorizes the Department of Housing and Urban Development to provide low interest loans, grants and other assistance for the construction and operation of housing for families with low incomes. 42 U.S.C. §1437b. In order to accomplish this purpose Congress recognized the need to vest maximum power and responsibility with local public housing authorities in order to promote efficient management of the housing programs. *Vandemark v. Housing Auth. of City of York,* 663 F.2d 436, 439 (3rd Cir. 1981). The act includes a declaration of policy which states, in pertinent part, that:

> '[i]t is the policy of the United States . . . to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs.' 42 U.S.C. §1437

The Housing Act did not, as suggested by Petitioner, displace local ordinances relating to building codes, health, safety or zoning. In *Kargman v. Sullivan,* 552 F.2d 2, 11 (1st Cir. 1977), the court held the federal legislation creating the network of subsidized housing laws *is superimposed upon and consciously interdependent with the substructure of local law relating to housing.* The court noted that dwellings on property eligible for §221(d)(3) loans must meet the requirements of all state laws or local ordinances relating to public health

or safety, zoning or otherwise. 12 U.S.C. §1715(d)(2). Id. at 11. These local laws advance significant and uniquely local interests with which courts should not lightly interfere. Id. Given a perceived conflict, especially in an area of strong local concern, reconciliation is to be preferred to complete ouster of a state law or municipal ordinance. Id.

Several state courts have held the National Housing Act was not intended to limit or exclude state action or to exercise supremacy in that area. *United States Constructors and Consultants, Inc. v. Cuyahoga Metropolitan Housing Authority,* 35 Ohio App. 2d 159, 167, 300 N.E. 2d 452, 456 (1973), held the Act merely sets forth a national housing policy to promote the general welfare of the nation by employing funds and credits to assist the states and their political subdivisions in eliminating unsafe and unsanitary housing conditions and the shortage of decent, safe, and sanitary dwellings for families of low income in urban areas by *permitting* the federal government to offer and provide financial assistance in the form of grants and/or loans to state or local housing agencies to develop low rent housing. 42 U.S.C.A. §1409 and 1411. "It is clear . . . that Congress did not intend to limit or exclude state action or to exercise supremacy in this area. There is no conflict between the federal law and regulations and Ohio law in regard to housing." Id. at 167, 300 N.E. 2d at 457.

City of Cleveland v. Berger, 91 Ohio App. 3d 102, 631 N.E. 2d 1085 (1993), held that an apartment building owner who was under contract with HUD to participate in a Section 8 program failed to establish that a complaint against him for city housing code violations was federally preempted. Berger argued the supremacy clause provides for the

preemption of *any* law which conflicts with federal law. Id. at 109, 631 N.E. 2d at 1089. The court held that mere differences between federal law and state law do not constitute a conflict sufficient to invoke preemption; it must be shown that compliance with both federal and state regulations is impossible or that the state law stands to impair achievement of the purposes and goals of the federal statute. Id. at 110, 631 N.E. 2d at 1090. The court held there was no evidence the federal government explicitly preempted state law in the area of public housing or that Congress intended to exclusively regulate the area. Id. at 1090. The court rejected Berger's argument that application of state law would disrupt the proper functioning of the federal Section 8 program, noting that Berger produced no evidence state housing code regulations were in conflict with federal legislation. Id.

In the present case the evidence at trial showed compelling local public health, safety, and welfare concerns. The buildings purchased by Petitioner had been abandoned and vacant for years. Many of the units were fired damaged and missing doors and windows. The local sheriff's office responded to *hundreds* of calls at the vacant buildings after they were acquired by Petitioner. Fire inspectors deemed the buildings fire hazards because they were full of trash, open to entry by vagrants and vandals, and falling down, conditions conducive to arson fires. There had in fact been a series of fires in the buildings.

The Jefferson Parish Council enacted a Dangerous Building Ordinance to protect the health, safety, and welfare of the general public by establishing a requirement that structures which were vacant, unsecured and unrepaired be

secured and repaired by the owner, at the risk of demolition if the owner failed to comply. Economic decline had caused the incidents of vacant, open structures to increase significantly. Derelicts, criminals, and drug traffickers habitually use such structures as hideouts. The Parish Council was compelled to provide a means of forcing owners to abate the hazards or to bear the costs incurred by the Parish in abating the hazards.

Orders requiring correction of the derelict conditions were served on Petitioner. Petitioner entered into a *consent judgment* wherein it agreed to take corrective action within a certain time period, barring which the Respondent was authorized to demolish the buildings. Petitioner did nothing to comply with the terms of the consent judgment. The Respondent, having notice of the dangerous and derelict condition of the buildings, had no choice but to move forward and abate the danger before a policeman, fireman or resident was injured. Had any person been injured in the buildings *after* the deadlines expired, the Respondent faced potential liability for failure to fulfill its governmental responsibilities. The Respondent is not answerable in damages for fulfilling its duty to protect the public health, safety and welfare.

In its statement of the case Petitioner extensively details contacts between Petitioner, the JPHA, and the United States Department of Housing and Urban Development with respect to Petitioner's efforts to secure a HAP contract once renovations were complete. Petition for Writ of Certiorari at 3-11. Petitioner contends demolition of the structures "eradicated two years of administration by HUD and countless hours spent to enforce an Act of Congress which

contains a statement of congressional policy." Petition for Writ of Certiorari at 6. Petitioner overstates HUD's limited role in this matter.

The Jefferson Parish Housing Authority (JPHA) is a separate political subdivision from the Respondent. LSA-R.S. 40:381 et seq. Contracts between the JPHA and Petitioner did not in any manner involve Respondent. (A49-A66).The AHAP between Petitioner and the JPHA was an agreement to enter into a contract for rentals *once the property was renovated.* (A49). Despite a two year effort, Petitioner could not secure financing for the renovations. The AHAP was terminated because Petitioner failed to commence renovations by July 1, 1991. *Hud's only involvement was to approve anticipated rents upon completion of renovations.* See *1610 Corporation v. Kemp,* 753 F.Supp. 1026, 1028 (S.D. Mass 1991).

Further, the AHAP entered into by Petitioner did not by its nature supercede and preempt local building codes or ordinances relating to zoning, health, safety, and welfare. To the contrary, the AHAP specifically provides that when the work is complete the owner must provide the JPHA with a certification that the units have been rehabilitated in accordance with applicable zoning, building, housing, and other codes, ordinances, or regulations. (A56). Rather than supercede and prempt local ordinances, the AHAP specifically requires compliance with such local ordinances.

This Court held that the Housing Act of 1937 does not explicitly provide for preemption of state law with respect to housing. *James v. Valtierra,* 402 U.S. 137, 138, 91 S.Ct. 1331, 1332 (1971). A federal appellate court held that the Housing Act of 1937 is superimposed upon and *consciously*

interdependent with the substructure of local law relating to housing, including requirements of local ordinances relating to public health or safety, zoning, or otherwise. *Kargman v. Sullivan,* 552 F.2d 2, 11 (1st Cir. 1976). Petitioner produced no evidence that local Ordinances on dangerous and derelict buildings are in conflict with *any* federal legislation. Petitioner has not shown that compliance with both federal and state regulations is impossible, or that state law stands to impair achievement of the purposes and goals of the federal statute. Petitioner's contention that local ordinances on dangerous and derelict buildings are preempted by the National Housing Act is meritless.

VI. *CONCLUSION*

Petition fails to carry its burden of showing that "federal claims" now raised were properly presented to the state courts. This Court therefore is without jurisdiction. Even were the court to treat the rule as purely prudential, the circumstances here justify no exception. Further, none of the traditional writ grant considerations exist in this case. No conflicting decisions are cited by Petitioner. Louisiana state courts did not decide any question of federal law. Petitioner does not point out any questions of federal law to be settled by this Court.

Neither the National Housing Act of 1937 nor the Section 8 program are implicated in this case. The fact that Petitioner entered into an AHAP does not establish performance of the AHAP is governed by federal law, or that controversy over its terms "arise under federal law" such that there is federal question jurisdiction. Even if the National Housing Act was implicated, it does not supercede or preempt local

ordinances protecting public health and safety. There was no intent by Congress to preempt local regulation of housing through building codes, zoning, or other ordinances. The AHAP documents themselves call for compliance with such local ordinances.

Petitioner's application for a Writ of Certiorari must be denied.

Respectfully submitted,

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G-/0745/0011/PLEADING/BRIEF.OPP

APPENDIX A

SUPREME COURT OF LOUISIANA

NO: _____

VICARI CONTRACTORS, INC.
Plaintiff/Appellant
RELATOR

VERSUS

PARISH OF JEFFERSON
Defendant/Appellee
RESPONDENTS

APPLICATION BY VACARI CONTRACTORS, INC. FOR WRITS OF CERTIORARI AND REVIEW TO THE LOUISIANA COURT OF APPEAL, FIFTH CIRCUIT IN CASE NO. NO: 97CA 00168c/w97CA00169

ON APPEAL FROM THE 24th JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON, STATE OF LOUISIANA, DOCKET NUMBERS: 420-579c/w434-842 HONORABLE SUSAN CHEHARDY, JUDGE-DIV."N"

ORIGINAL PETITION OF VICARI CONTRACTORS, INC.
Plaintiff/Appellant
Relator

Respectfully submitted,

/s/ Stephen J. Caire

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STATEMENT OF WRIT GRANT CONSIDERATION

a.

Significant Unresolved Issues of Law

At issue in this case is the extent to which a governing authority may condemn any building or structure which is private property; more specifically, when the conditions, which caused the buildings to be condemned, can be cured by remedial measures without demolition, are the owner's fundamental rights to due process of law violated and denied when the governing authority, nevertheless, chooses to itself demolish private property rather than to remedy the offending conditions. Plaintiff/Relator had applied for and been granted a building permit for remedial work.

The issue of the nature and extent of power exercised by a condemning governing authority is a significant unresolved issue of law.

b.

Conflicting Decisions

The governing authority did not vote to order the demolition of Plaintiff's/Relator's apartment complex. The facts presented during the trial of this case raise several issues regarding the delegation of legislative power to the executive branch of the governing authority. Indeed, whether or not the power to demolish private proterty can be delegated is a controlling issue in this case along with the issue of strict interpretation and application of such laws. The decision of the Court of Appeal conflicts with the decisions of the Supreme Court.

c.

Gross Departure From Proper Judicial Proceedings

The credibility and impeachment of witnesses at trial is a key issue. The trial court would not allow counsel for Plaintiff/Relator the opportunity to proceed with an effort to impeach certain witnesses who are members of the executive branch of government or attack their credibility. The court of appeal sanctioned such departure by the lower court from proper judicial proceedings. Under these conditions, Plaintiff/Relator did not receive a fair trial and, as such, the trial of this case merits review by the Supreme Court.

ii.

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MEMORANDUM

(a)

Summary of the Nature of the Case and Prior Proceedings

On July 29, 1991, plaintiff/appellant, Vicari Contractors, Inc., filed a petition for writ of injunction seeking to enjoin defendant/appellee, the Parish of Jefferson, from demolishing plaintiff's/appellant's apartment complex. **(Case NO. 420-579)(Record: Vol. 1, p.I)** Plaintiff/appellant had been informed by defendant/appellee on July 25, 1991, that the work order to demolish plaintiff's/appellant's apartment complex would be issued on Friday, July 26, 1991, and demolition would begin on Monday, July 29, 1991. At the commencement of the trial for a preliminary injunction the parties reached an agreement which was dictated into the record on August2, 1991 **(See Exhibit Vicari #10)**. Notwithstanding the agreement, the Parish of Jefferson, defendant/appellee, did in fact demolish plaintiff's/appellant's complex albeit defendant/appellee, the Parish of Jefferson, had actual knowledge that finality had been reached by plaintiff/appellant with both the Jefferson Parish Housing Authority and the United States Department of Housing and Urban Development to renovate the apartment complex. **See, Vicari Exhibit No. 11)**

The plaintiff, after dictating an agreement in the record, later, on August 23, 1991, refused to sign the consent judgment. Plaintiff/appellant alleged the refusal to sign signified his withdrawl of his consent. Plaintiff claims that at that moment, the Parish of Jefferson was required to seek judicial enforcement; defendant/appellee rather that do so, the Parish of Jefferson, proceeded at its peril to engage in wrongful

conduct by taking private property and destroying it, after admitting by the issuance of a building permit for remedial work that the private property did not need to be destroyed. The agreement which was dictated into the record and reduced to the form of a Consent Judgment was presented to the judge by defendant/appellee, the Parish of Jefferson, and signed by him in chambers on August 23, 1991. **(Record Vol. 1, pp. 15-17)** A petition to annul the Consent Judgment was filed by the plaintiff/appellant on June 24, 1993, shortly after its discovery of fraud and ill practice. **(Case No. 420-579)(Record: Vol. 1, pp. 20-24)** Plaintiff/appellant had also filed a Petition for Damages for Wrongful Demolition of Private Property on June 15, 1992. **(Case No. 434-842)(Record: Vol. single, p.1)**

These cases were consolidated in both the trial and appellate courts. (A clerical error resulted in one of the captions showing plaintiff/appellant to be Vicari Construction, Inc. The real party plaintiff in both cases is Vicari Contractors, Inc.)

On March 26, 1993, defendant/appellee filed a Peremptory Exception of Res Judicata, claiming that the consent judgment signed on August 23, 1991, barred plaintiff's/appellant's damage action. The trial judge denied the exception **Record: Vol. Single, pp. 116-118).** Application For Writs was filed by defendant/appellee in the Court of Appeal, Fifth Circuit, No. 94-C-199 **(Record: Vol. 1, p. 89).** On March 16, 1994, the applicant's writ was denied and characterized plaintiff's/appellant's petition for damages to be an action for wrongful enforcement of the consent agreement. Likewise, the Supreme Court of Louisiana denied the defendant's/appellee's application for writs No. 94-C-1051 **(Record: Vol. page 90).**

The case proceeded to trial and judgment was rendered on August 27, 1996 **(Record: Vol. 2, pp. 319-320)**

The trial judge did not assign reasons for judgment

The Court of Appeal rendered its opinion on October 15, 1997 and affirmed the judgment of the trial court. Plaintiff's/Appellant's application for rehearing was timely filed and was denied on November 17, 1997.

(b)

ASSIGNMENT OF ERRORS

1. The trial judge failed to find that the conduct of the Parish of Jefferson was a wrongful enforcement of the consent agreement between plaintiff/appellant, Vicari Contractors, Inc. and defendant/appellee, the Parish of Jefferson. This failure was error.

2. The trial judge failed to find that the wrongful enforcement of the consent agreement was a cause in fact by defendant/appellee, the Parish of Jefferson, of damage to plaintiff/appellant Vicari Contractors, Inc. This failure was error.

3. The trial judge failed to find that the refusal by plaintiff/appellant to sign the consent judgment established a lawful withdrawal of it consent. This failure was error.

4. The concurrence of both spouses is required to dispose of all or substantially all of the assets of a community business. The trial judge gave judicial recognition to the consent agreement which disposed of all the assets of the corporation. In so doing, the trial judge was in error.

5. The plaintiff/appellant, a corporation, did not receive notice according to law. The trial judge failed to find insufficient notice. The trial judge in so doing committed error.

6. The trial judge prohibited counsel for plaintiff/appellant from impeaching the testimony of Mr. Paul Connick, Sr., and Mr. Perrin C. Butler, Jr. This restraint imposed upon counsel for plaintiff/appellant was error.

7. The trial judge dismissed plaintiff's/appellant's Petition to Annual the August 2, 1991, Consent Judgment. This dismissal was error.

8. The trial judge to sequester witnesses permitting both Mr. Paul Connick, Sr. and Mr. Perrin C. Butler, Jr. to remain in the courtroom during trial. Both of these gentlemen were significant material witnesses as representatives of the defendant/appellee, Parish of Jefferson. This ruling of the trial Judge was error.

(c)

Summary of Argument

A.

Interpreting Statutes And Ordinances

We must be governed by the well-established principles of statutory interpretation of our State if we are to ascertain their meaning. Those principles are:

1) Where the words of a law are dubious, their meaning may be sought by examining the context with which the ambiguous words, phrases and sentences may

be compared, in order to ascertain their true meaning. **(LSA-CC Art. 16; NOW, LSA-CC Art. 12)**

2) Laws in pari materia, or upon the same subject matter, must be construed with a reference to each other, what is clear in one statute may be called in aid to explain what is doubtful in another. **(LSA-CC Art. 17: NOW.LSA-Art. 13)**

3) Statutory provisions should be construed along with the remainer of the statute and in connection with all laws on the same subject matter. **Melancon v. Mizell, 44 So.2d. 826 (La., 1950)**

4) All statutory provisions are to be given effect whenever possible. **Chappuis v. Reggie, 62 So.2d. 92 (La., 1952)**

5) A title is no part of a statute, but it may be considered in determining legislative intent where doubt exists. ***Schimpf v. Thomas*, 15 So.2d. 880 (La., 1943)**

In the case of ***Abbott v. Parker*, 249 So.2d 908 (La., 1971)**, the Supreme Court of Louisiana explained that a special statute prevails over a general statute, holding:

> Under this construction of Paragraph (T), the special law (constitutional provision) relating to issuance of bonds by the Stadium District prevails over the subsequent general legislation regulating bond-issuance. A general rule of statutory construction is that, in the absence

of legislation intent to the contrary, a special statute enacted for a particular purpose will not be presumed to have been within the scope of a subsequent general enactment on the same subject matter, State ex rel. Day v. Rapides Parish School Board, 158 La. 251, 103 So. 757 (1925); that, in the event of ambiguity or conflict, special laws prevail over general laws. ***State v. Mejia*, 250 La. 518, 197 So.2d 73 (1967); State Through *Department of Highways v. Macaluso*, 235 La. 1019, 106 So.2d 455 (1958); see 82 C.J.S. Statutes s 347 b.** Here, of course, mere legislation general in nature cannot be deemed to have modified a self-executing constitutional provision specially regulating in its entirety a specific state instrumentality.

B.

Factual Summary

1. The Parish of Jefferson did not delegate its police to order the demolition of dangerous buildings owned in the private sector to its executive branch of government; accordingly, the demolition of plaintiff's apartment complex by offices or employees of the Parish of Jefferson was vires acts for which the Parish of Jefferson is liable to plaintiff. **(See testimony of former Parish President, Michael J. Yenni, by deposition as Vicari Exhibit No. 4)**

2. The Jefferson Parish Council, governing authority, retained its police power regarding owners of private property who were participating in HUD'S Federal Section 8 Project Based Assistance program by passing a special resolution

addressed to HUD requesting that HUD expedite its processing of pending participants, of which plaintiff was one. **(Vicari Exhibit No. 6)**

3. The executive branch of the Parish of Jefferson, through its then President, Hon. Michael J. Yenni, did not deligate any authority to either Mr. Paul Connick, Sr., Chief Administrative Assistant, or to Mr. Perrin C. Butler, Jr., Assistant Parish Attorney; on the contrary, he too wrote letters to HUD stating that "...this project is very necessary to meet the needs of the low income people in this area who would like to live there and it is an integral part of our overall strategy for the restoration of this very strategic neighborhood." **(Vicari Exhibits No. 7 & 8)**

4. Parish President Yenni, in his letter to HUD dated December 14, 1990, recognized the Jefferson Parish Housing Authority as the specific agency to which authority had been delegated to administer HUD'S Section 8 Project Based Program saying, "...The Housing Authority of the Parish of Jefferson's assessment of the placing of the Project in this area was one that was taken with much care and thought concluding that the above site was very accessible to social, recretional, educational, commercial, and health facilities and services and other municipal facilities. ***In fact, it appears that the above site is superior to many other sites in Jefferson Parish in that all of the above amenities outlined can be accessed by these residents without motorized transportation.***"**(emphasis added) (Vicari Exhibits No. 7 & 8)**

5. Plaintiff purchased the property relying upon the authority delegated to the Jefferson Parish Housing

Authority as described by Mr. Yenni in his letter to HUD dated December 14, 1990; and, which authority had been delegated far in advance of the purchase of the property by plaintiff on December 29, 1989. **(Vicari Exhibit No. 1 and Exhibit D #12)**

6. The Housing Authority of Jefferson Parish executed a contract with plaintiff, the effective date of that agreement being May 30, 1991. **(Vicari Exhibit No. 5)**

7. On August 22, 1991, prior to commencing demolition of plaintiff's apartment complex, defendant/appellee had actual knowledge that HUD had given its final approval to the contract between the Housing Authority of Jefferson Parish and plaintiff. **(Vicari Exhibit No. 11)**

8. Mr. Paul Connick, Sr., admitted having a meeting with plaintiff's representative, Mr. Peter G. Vicari, who advised Mr. Connick of the approval by HUD, which meeting was on or about August 22, 1991. At that meeting Mr. Connick told Mr. Vicari that he did not care about HUD'S approval and was going to demolish plaintiff's buildings anyway. Mr. Connick's agreed that he knew of HUD'S approval. **(Record: Vol. 3, p. 35, lines 18-20)(Record: Vol 2, p. 396, lines 12-32)(Record: Vol. 3, p. 631)**

9. Plaintiff's sole asset was the apartment complex demolished by the Parish of Jefferson and Mr. Peter G. Vicari lacked authority, as a matter of law, to dispose of that asset in any manner whatsoever. **(Testimony of Barbara Vicari, Vol 3, p. 654, lines 6-32; p. 655, lines 1-8)**

10. Mr. Peter G. Vicari was not the agent for service

of process on plaintiff, and, as a matter of strict construction of the law, plaintiff did not receive sufficient notice of these condemnation proceedings. **(Testimony of Barbara Vicari, Vol. 3, lines 19-25)**

11. The conduct of Mr. Paul Connick, Sr., in having plaintiff's apartment complex demolished were acts on his part, which are not reasonably related to the legitimate governmental objective of the Parish of Jefferson to participate in JUD'S Section 8 Project Based Assistance Program; furthemore, such conduct was outrageous, reckless and flagrant misconduct for which the Parish of Jefferson is liable to plaintiff. **(Testimony of Mr. Connick; Record: Vol. three, p. 628 lines 25-32, p. 629 lines 1-24)**

ARGUMENT ON ASSIGNMENT OF ERRORS 1 AND 2

PART 1.

Defendant/Appellee, the Parish of Jefferson, demanded in the ORDERS dated May 24, 1991 that Vicari perform certain remedial or curative work on the buildings so that permits could be issued and work begun on the apartments. In those orders, which are already part of the record before this Honorable Court, Vicari was directed to Exhibit C of the order remedy the defects, which states in part:

2. The owner has until the 30th day following the date of this order to perform one of the following:

(a) obtain a building permit from the JEFFERSON PARISH DEPARTMENT of INSPECTION and CODE ENFORCEMENT for the repair of the building

> and begin repairs to the building in conformity with all applicable Parish and State Codes.

The Parish of Jefferson issued an ORDER similar to this for all of Vicari's buildings, each dated May 24, 1991.

On August 6, 1991, the Parish of Jefferson executed a RELEASE OF ORDER for each of Vicari's buildings. Paul Connick, Sr., head of the Dangerous Building Abatement Division of Jefferson Parish, signed each release. Each release was executed before a notary public in the presence of two witnesses. Each release states under oath **"That said order has been *satisfied*** and that this affidavit is now made for the purpose of authorizing and directing the Reorder of Mortgages for the Parish of Jefferson **to erase the said Order entirely** from his records." **(See Defendant's Exhibit D #58)**

La. Civil Code Article 1835 sets forth the significance of an authentic act as it "constitutes full proof of the agreement it contains, as against the parties, their heirs..." La. Civ. Code Art 1835. Article 1848 clearly states that "[t]estimonial or other evidence may not be admitted to negate or vary the contents of an authentic act or an act under private signature.

In ***Brown v Drille, Inc.***, 630 So.2d 741, 93-1019 (La. 1994), the Supreme Court addressed the issue of allowing parol evidence to modify the contents of an authentic act.

> Louisiana courts, applying LSA-C.C. Art. 2056's general rule of construction, have not hesitated to confine their analysis to the four corners of the instrument. When, as in that instance, a contract can be construed from the four corners of the instru-

> ment without looking to extrinsic evidence, the ***question of contractual interpretation is answered as a matter of law and thus summary judgment is appropriate.*** *Wilson v. Cost+Plus of Vivian, Inc.*, 375 So.2d 683, 685 (La.App.2d Cir. 1979); *Horton v. Mobley*, 578 So.2d 977, 982 (La.App. 2d Cir. 1991).

Brown, at 749-750 **(emphasis added)**. It is undeniable that each of these releases is an authentic act and satisfies all of the formalities set forth in **L.A.Civil code Article 1833**. The words of the releases are clear and explicit and lead to no absurd consequences, therefore no further interpretation may be made in search of the parties' intent. **La. Civ.Code Art. 2046.**

In ***Billiot v. MOMAR, Inc.***, 655 So.2d 363 (Ct. of App. 5th Cir. 1995) the Fifth Circuit Court of Appeals also addressed the issue of allowing parol evidence to refute or contradict the terms of an authentic act.

> **The meaning and intent of the parties to written contract which is clear, explicit, and leads to no absurd consequence must be sought within the four corners of the instrument,** Bonfanti Marine, Inc. v. Clement, 439 so.2d 537 (La.App. 1st Cir. 1983); McClelland v. Security Industrial Insurance Co., 426 So.2d 665 (La.App. 1st Cir. 1982), writ denied, 430 So.2d 94 (La. 1983). **Parol evidence may not explain, vary, add to, or subtract from the writing.** Ashley Enterprises, Inc. v. Esplanade Plaza Co., 425 So.2d 1010, 1012 (La.App.5th Cir.), writ denied, 432 So.2d 270

> (La.1983); Carnpesi v. Margaret Plantation, 417 So.2d 1265, 1269 (La.App. 1st Cir.), writ denied, 422 so.2d 163 (La.1982); Mathieu v. Nettles, 383 So.2d 1337 (La.App. 3rd Cir.) writ denied, 390 So.2d 202 (La.1980).

Id. at 366 **(emphasis added)**.

Defendant, the Parish of Jefferson, executed authentic acts wherein it stated unequivocally that Vicari had complied with the requirements of its ORDERS dated May 24, 1991. However, Defendant then proceeded to demolish Vicari's buildings **without notice,** operating under the premise that Vicari had not complied with the requirements of the ORDERS dated May 24, 1991.

In essence, the Parish of Jefferson had sworn under oath that Vicari satisfied the requirements. Any other position taken now by Defendant would be inconsistent with the authentic acts recorded in the mortgage record of Jefferson Parish, and would be an attempt to vary the terms of an authentic act. The Civil Code and the jurisprudence are clear that Defendant may not assert anything other than that which it has already sworn to in its authentic act. Given the inability of defendant to maintain any other position, it is clear that defendant wrongfully demolished Vicari's buildings based on the "four corners"; of defendant's releases.

PART 2.

In this case the special statute upon which plaintiff relies is **LSA - R.S. 33:1236(11)**, which provides in pertinent part:

(m) Housing development and services organizations, including development of programs and services, under other federal housing legislation, for needy tenants and homeowners, but not including mortgage loans and long-term capital financing;

The Jefferson Parish Housing Authority was acting under authority of the above quoted statute on behalf of the Parish of Jefferson when it executed the contract with plaintiff. The objective of that statute was accomplished by the Jefferson Parish Housing Authority; therefore, the demolition of plaintiff's apartment complex cannot be rationally related to the exercise of police power by the Parish of Jefferson under the aegis of a general statute. See *Abbott*, supra.

LSA - R.S.33:1236 (49), provides in pertinent part:

(a)(i) To enact ordinances relating to the repair and condemnation of buildings, dwellings, and other structures that have become derelict and present a danger to the health and welfare of residents of the parish upon adequate notice to the owner. However, with respect to structures within a historical preservation district, the governing authority of the district shall have concurrent authority with respect to such matters.

(ii) The phrase "derelict and present a danger to the health and welfare", as used in this Paragraph, shall include, but not be limited to, buildings or structures which have any of the following characteristics:

(aa) Are structurally unsafe.

(bb) Are not provided with adequate egress.

(cc) Constitute a fire hazard.

(dd) Are otherwise dangerous to human life.

(ee) By way of existing use or condition constitute a hazard to public safety, health, or welfare by reason of inadequate maintenance, dilapidation, obsolescence, fire hazard, or abandonment.

.iii) Ordinances enacted pursuant to this Paragraph may declare such derelict structures to be public nuisances, and require their repair, rehabilitation, demolition, or removal.

(iv) The governing authority of any parish may request and the adjutant general may assign, subject to the approval of the governor, national guard personnel and equipment to assist in the removal and demolition of condemned buildings, structures, or public nuisances. The provisions of this item shall be applicable when the budget for the demolition and removal of condemned structures has been expended by the governing authority of a parish. However, the request must be accompanied by documentation that all procedural protections and substantive restraints have been adhered to by the governing authority. In the event all protections and substantive restraints have been adhered to by the governing authority, the parish and their personnel and the national guard and their personnel shall not be liable to the owner of

the building, structure, or public nuisance for any damages sustained resulting from the demolition of the building, structure, or public nuisance.

(b)(i) In the exercise of the authority herein granted, ***the governing authority of the parishes of Jefferson.*** Calcasieu, Tangipahoa, St. Helena, Quachita, West Baton Rouge, Iberville, Caddo, and Livingston may, among other things but not by way of limitation ***require or compel property owners to repair or demolish such structures on their property.***

The Supreme Court of Louisiana explained the principle in ***Chappuis v. Reggie, 62*** **So.2d 92 (La., 1952).** saying:

The uniform jurisprudence is to the effect that all statutory provisions are to be given effect whenever possible. LSA Civil Code of Louisiana, Art. 17; State v. Texas Co., 205 La. 417, 17 So. 2d 569; Town of Abbeville v. Police Jury, 207 La. 779, 22 So. 2d 62; Melancon v. Mitzell, 216 La. 711, 44 So.2d 826. If acts can be reconciled by a fair and reasonable interpretation, it must be done since the repeal of statute by implication is not favored and will not be indulged if there is any other reasonable construction. Town of Abbeville v. Police Jury, supra; State v. Standard Oil Co. of La., 188 La. 978, 1054, 178 So. 601; Mouledoux v. Maestri, 197 La. 525, 2 So. 2d 11; State v. Jones, 220 La. 381, 56 So. 2d 724. Moreover, where two acts relating to the same subject are passed at the same legislative session, there

> is a strong presumption against implied repeal, and they are to be construed together, if possible, so as to reconcile them, giving effect to each. State v. Shushan, 206 La. 415, 19 So. 2d 185; City of New Orleans v. Board of Supervisors of Elections, 216 La. 116, 43 So. 2d 237. In the latter case this Court quoted with approval the following language: "Where it is possible to do so, it is the duty of the courts, in the construction of statutes, to harmonize and reconcile laws * * *. These rules are particularly applicable to statutes passed at or about the same time or at the same session of the legislature, since it is not to be presumed that the same body of men would pass conflicting and incongruous acts.' 216 La. at pages 144-145, 43 So.2d at page 246.

Therefore, the mandate of the Supreme Court of Louisiana is that it is the duty of the court to harmonize and reconcile the above quoted sections of **LSA -R.S. 33:1236**. Such harmony and reconciliation dictates that judgment be rendered to favor of Plaintiff/Relator, Vicari contractors, Inc.

ii.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 3

A more detailed explanation of the significance and characterization of a consent judgment was given by the Third Circuit Court of Appeal of Louisiana in the case of ***Succession of Morvant.*** 578 So.2d 549 (Ct. of App. 3rd Cir., 1991), wherein the court said

> A consent judgment is a bilateral contract and must be based on consent, an essential element of a contract. At the heart of the consent judgment

is an admission by a party to the litigation of the validity of his opponent's claim against him in such a way as to leave no issue to be tried. Comment (c), LSA - C.C.P. Art. 2085.

The jurisprudence has established certain guidelines for determining whether a certain judgment was consensual. In King v Crawford, 334 So.2d 476 (La.App. 1st Cir. 1976), writ refused, 337 so.2d 879 (La.1976), ***the appellate court*** refused to dismiss an appeal, finding that although a consent judgment was confected, the appellant the withdrawal of his consent by refusing to sign it on the ground that the judgment did not reflect the stipulation to which all parties agreed. Likewise, the various appellate courts have looked to other procedural mechanisms utilized to show disagreement with a consent judgment which would signify rejection of the consensual requirement. In Martin v. Holder Sheet Metal Works, Inc., 176 so.2nd 500 (La. 1979), the Supreme Court implied that it would have considered the rejection of the consent judgment had the employer's attorney objected on record to the provisions of the judgment or had he moved for a new trial. See also Hill v Hill, 471 So.2nd 1130 (La.App. 3rd. Cir.1985)

The consent judgment at issue shows counsel for the plaintiff refused to sign the consent judgment alleged to be res judicata. By refusing to sign, the plaintiff, through his counsel, signified the withdrawal of his consent. At that moment, the defendant, the Parish of Jefferson, was required to seek judicial enforcement; rather than do so, the Parish of Jefferson, proceeded at its peril to engage in infamous conduct by taking private property and destroying it after ad-

mitting, by the issuance of a building permit, that the private property subject of the taking did not need to be destroyed.

In ***Morvant,*** supra, the court further recognized:

> A compromise is a contract. LSA-C.C. Art. 3071. Legal agreements have the effect of law upon the parties and the courts are bound to give legal effect to all such contracts according to the true intent of the parties. Smith v. Leger, 439 So.2d 1203 (La.App. 1st Cir.1983).
>
> * * *
>
> In the present case, the trial court correctly concluded that the judgment of possession embodied a compromise between the parties which was recited into the record in open court. However, under LSA-C.C. Art. 3079 and interpretative jurisprudence, contracts of compromise may be vitiated by error of fact bearing on the principal cause, and may be rescinded whenever there exists an error on the matter in dispute. Misuraca V. Metropolitan Life Ins. Co., 199 La. 868, 7 So.2d 167 (1942).

There can be no doubt that the consent judgment, even if the court should find that it is valid notwithstanding the absence of the signature of counsel for the plaintiff, that it may be vitiated by error of fact bearing on the principal cause, and may be rescinded. The error in this case was the reliance by the Parish of Jefferson on HUD's admitted error in approving only fifteen (15) units.

iii.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 4

Peter G. Vicari and Barbara T. Vicari have been married to each other but once, and were living together as husband and wife at the time of the formation of the corporation, Vicari Contractors, Inc. Since Vicari Contractors, Inc. was formed during the marriage of Peter G. Vicari and Barbara T. Vicari, and was formed using community funds, Vicari Contractors, Inc. is a community owned business enterprise.

In that regard, **LSA - CC Art 2338,** entitled Community Property, provides:

> The community property comprises; property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse, property acquired with community things or with community and separate things, unless classified as separate property under Article 2341; property donated to the spouses jointly; natural fruits of community; damages awarded for the loss or injury to a thing belonging to the community; and all property not classified by law as separate property.

In ***International Stevedores Inc., v. Hanlon,*** 499 So.2d 1183 (5th Cir., 1986), this Court held:

> A stock certificate is prima facia evidence of corporate ownership, but is distinguished from actual ownership, which may be determined from all the facts and circumstances of the case. ...It is only

> paper evidence of the ownership of shares of stock created for convenience. It is not the certificate which is subject to ownership, but the share of stock itself.

As such, neither Mr. Vicari nor his wife, could have undertaken to unilaterally dispose of that property designated as community. Support for this concept is found in **LSA - CC Art. 2337** entitled Disposition of Undivided Interest, which provides:

> A spouse may not allienate, encumber, or lease to a third person his undivided interest in the community or in particular things of the community prior to the termination of the regime.

Generally, each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law. See **C.C. Art. 2346.** However, the laws dealing with the management of community property recognize exceptions which are pertinent to this case. The exceptions are provided in **C.C. Art. 2346** and stated by the phrase "*unless otherwise provided by law.*"

In this case there are two (2) exceptions which are pertinent. The first is **C.C. Art. 2347** which provides:

> The concurrence of both spouses is required for the alienation encumbrance, or lease of community immovables, furniture or furnishings while located in the family home all or ***substantially, all of the assets of a community enterprise*** and movables issued or registered as provided by law in the names

of the spouses jointly. (Emphasis added)

Another such exception is found in **C.C. Art. 2353** which addresses the effect of alienation of community property by one of the spouses. That article provides:

> When the concurrence of the spouses is required by law, the alienation, encumbrance, or lease of community property by a spouse is relatively null unless the other spouse has renounced the right to concur. Also, the ***alienation, encumbrance, or lease of the assets of a community enterprise by the non-manager spouse is a relative nullity.*** (Emphasis added)

In the instant case not only is the controlling authority governing Mr. Vicari's inability to disposes of the entire asset base of the corporation as cited above, but the laws respecting corporations, **LSA R.S. 12:121,** also govern the voluntary transfer of corporate assets and, in pertinent part, provides:

> B. If the corporation is ***not insolvent,*** such authority may be given only by the ***shareholders,*** by vote of at least two-thirds of the voting power present (or by such greater or lesser proportions, not less than a majority, of the voting power present or of the total voting power, as the articles may require)
> . . .

Thus, the above quoted pertinent part of **LSA R.S. 12:121** is consistent with the laws regulating the management of community property. The Consent Judgment which resulted

in the demolition of all of the assets of Vicari Contractors, Inc. is not valid because **LSA R.S, 12:121** required a vote in favor of such action by Barbara T. Vicari, which she did not give. Based on the reasoning in the above cited case, entitled ***International Stevedores Inc., v. Hanlon.*** Barbara T. Vicari, by virtue of the laws regarding management of the community property regime, owns a fifty percent (50%) interest in the shares of stock of Vicari Contractors, Inc.

When the above three (3) articles regarding the community property regime are applied to the facts in this case, it bocomes clear that the concurrence of both spouses is required to validy enter into an agreement which results in a demolition of substantially all of the assets of a community enterprise. Both spouses held executive positions with the corporation. Peter G. Vicari held the office of president, and Barbara T. Vacari held the office of secretary. The participation of each in the management of the assets of this community enterprise is evidenced by the sale of property to Vicari Contractors, Inc. on December 29, 1989.

The testimony of Barbara T. Vicari on rebuttal clearly shows that she had not renounced her right to concur in the alienation of the assets of a community enterprise; therefore, the agreement reached in open court on August 2, 1991, without the concurrence of Barbara T. Vicari is null under the authority of **C.C. Art. 2353.**

iv.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 5

PART I

The Supreme Court of the Louisiana, in **Housemaster Corp. V. City of Kenner,** 374 So.2d 1240 (La., 1979) held:

> Generally, a municipality in the exercise of its police power may, without compensation, destroy a building or structure that is a menace to the public safety or health. At a minimum, however, that municipality must, before destroying a building, give the owner sufficient notice and a hearing to satisfy the governmental responsibility to accord due process of law. 7 E. McQuillan, Municipal Corporations 24.561 (3d ed 1968); *Miles v. District of Columbia,* 510 F.2d 188 (D.C. Cir. 1975). We consider it axiomatic that statutes providing these procedural protections and substantive restraints must be strictly construed, particularly to the requirement that the property owner be notified of the hearing.

LSA - R.S. 33:4771 et seq governs the exercise of police power by a political subdivision in the enforcement of its building code. That statute, in pertinent part, provides:

> (2) "Building Code" means any building, mechanical, plumbing, electrical, fire prevention, or other regulatory code or ordinance adopted by a political subdivision which established minimum standards for the use, occupancy, design, planning, engineering, construction, alteration, installation, repair, maintenance, location, removal, *or demolition* of any building, structure, or improvement to immovable property or for the quality of materials or equipment used in connection therewith.
>
> * * *

> (9) "Political subdivision" means any ***parish or municipality which has authority to adopt and enforce a building code pursuant to this Part.*** LSA - R.S. 33:1236, ***any other general or special law, any charter or home rule plan of government, or any other authority or grant of power.*** (Emphasis added)

Therefore, the Parish of Jefferson falls within the definition of the statute which governs the removal of dangerous structures, particularly LSA -R.S. 33:4761, et seq. In that regard, the Supreme Court of Louisiana has recognized that **LSA - R.S. 33:4762** is to be strictly complied with, ***Housemaster,*** supra. that statute provides strict requirements which must be satisfied before a governing authority can exercise its police power to demolish private property. **LSA - R.S. 33:4762 A.** provides:

> Before the ***governing authority*** may condemn any building or structure, ***there must be submitted to it a written report recommending the demolition or removal of the building signed by some city official or other person authorized to act in such matters*** for the municipality. The mayor or chief executive shall thereupon serve notice on the owner of the building or structure requiring him to ***show cause at a meeting of the governing authority,*** regular or special, why the building or structure should not be condemned. The date and hour of the meeting shall be stated in the notice which shall be served at least ten days prior to the date of the hearing except in case of grave public emergency as thereinafter provided. The notice may be served

by registered or certified mail, postage prepaid, addressed to the owner at his last known address. The notice may also be served by the marshal of the municipality or by any sheriff or deputy sheriff or constable having jurisdiction and power to serve legal process where the owner of the buyilding or structure is found in the State of Louisiana, and their officer shall make return of the sservice as in ordinary cases. (Emphasis added)

LSA – CC Art.17 [now CC Art. 13] states: "Laws on the same subject matter must be interpreted wiwth reference to each other." The interpreter must also look to the provision of R.S. 33:4762 A, to determine the intent of the Legislature that attaches to the police power delegated to political subdivisions when the political subdivsion condemns any building or structure. The requirement established by the Legislature in R.S. 33:4762 A is that a written report recommending the demolition must be signed by some official authorized to act in such matters and, then, a meeting of the governing authority of the political subdivision must be held so that the gaoverning authority itself has the opportunity to determine whether or not it should exercise police power to demolish private property.

The Parish of Jefferson ***did not prepare a written*** report recommending the demolition of plaintiff's building; nor was a meeting of the governing authority convened for that purpose. **(Record: Vol. 3, p. 644)** Therefore, the Parish of Jefferson failed to strictly comply with Louisiana Law and negligently demolished plaintiff's property causing substantial economic damages.

PART II

The parish of Jefferson further failed to strictly comply with its own ordinance, number 18050, as amended by ordinance No. 18130. **(Exhibit D #80)**. That ordinance addresses the procedures to be followed regarding the exercise of its police powers to demolish dangerous buildings. Sec. 19-63 (f) (3) specifically restricts the demolition of a building to one which cannot reasonably be repaired. The Parish of Jefferson issued to Vicari Contractors, Inc. a building permit **(See Defendant/Appellee Exhibit No. D 52) (Record: Vol. 1, p, 45)** and thereby acknowledged that the building could have been reasonaably repaired.

Furthermore, Sec. 19-63 (h) provides that after the Owner has taken measures, i.e. obtained a building permit to perform the remedial work, the Owner must receive notice and the Hearing Officer shall reconvene the hearing before he may issue a revised order that the building be demolished.

Accordingly, the Parish of Jefferson ignored not only the laws of the State of Louisiana but also its own ordinance, both of which establish a duty on the part of the governing authority to determine that the building cannot reasonably be repaired. The Parish of Jefferson violated that duty to the plaintiff and caused substantial economic loss.

In conclusion, plaintiff/appellant vigorously argues that the United States Department of Housing and Urban Development, HUD, would certainly not have approved plaintiff's buildings for a federaly funded project if those buildings could not reasonably be repaired.

PART III

Delegation Of Legislative Power To Executive Branch Prohibited As Unconstitutional

The Supreme Court of Louisiana has had occasion to decide how administrative officers can administer laws. In ***Commissioner of Agriculture v. Plaquemines Parish Commission Council,* 439 So.2d 348 (La. 1983).** our Supreme Court held:

> Here, the statute has no standards to guide the advisory commission on pesticides or the commissioner in determining whether to approve or disapprove more restrictive regulations by local political subdivisions. Absent any standards, the requirement is void as an unconstitutional delegation of legislative power to the executive branch of government.

Neither Mr. Connick nor Mr. Butler were given any standards to guide them. If there was any delegation at all, it was to the "independent hearing officer". Therefore, to the extent that any delegation to them may have been intended by the Jefferson Parish Council and, considering both testified that they acted in ignorance of the resolution of the Council, the President's letters and the contract executed by the Jefferson Parish Housing Authority, such a delegation of police powers is unconstitutional.

It is axiomatic that at the time the decision was made by Mr. Connick to demolish Plaintiff's/Relator's private property, all other decisions affecting private property were made by a vote of the Jefferson Parish Council. The various

boards and commissions acted in an advisory capacity only. Stated another way, the Jefferson Parish Council did not delegate its decision making authority to boards and commissions such as the Zoning Appeal Board, the Planning Advisory Board and the Standards and Appeals Board (Building Code). Presently, the decision to demolish private property is determined by a vote of the Jefferson Parish Council, a right of due process which was denied to Vicari Contractor, Inc. because Mr. Connick alone made that decision.

Additionally, the Supreme Court of Louisiana has held that a local governmental authority cannot prohibit a person from performing acts after a license (permit) has been issued, ***City of Shreveport v. Restivo*, 491 So.2d 377 (La. 1986)**, reasoning:

> The critical issue involves the Code's prohibition against a journeyman plumber's engaging in any manner in the business of plumbing, although he holds an occupational license from the State, unless he or a member of his firm is licensed as a master plumber. Therein lies a possible conflict between the Code and the statutes, but the issue is more approriately addressed in terms of the *reasonable* exercise of the City's police power.
>
> Police power is the power of a governmental body to impose laws and regulations which are reasonably related to the protection or promotion of a public good such as health, safety or welfare. City of Shreveport v. Curry, 357 So.2d 1078, 1079 (La. 1978). The business of plumbing is so intimately connected with the public health as to be generally the proper subject of regulation under the police

power of the governing authority. State v. Malory, 168 La. 742, 123 So. 310 (1929). However, it is also necessary to determine whether the section under scrutiny is reasonably related to some objective concerned with public health.

As previously stated, there was no evidence whatsoever in the record. Moreover, there is no apparent reason related to the public health why a licensed journeyman plumber cannot engage in the business of plumbing to the extent of repairing a leaking lavatory without being a master plumber or being in a firm with a master plumber. (FN5) The Code recognizes that such work does not even necessitate the issuance of a permit. The same objective which apparently prompted the City to require licensing of master plumbers cannot be said to warrant requiring a master plumber's license to fix a leaking lavatory.

On the narrow issue presented in this case, we hold that the City of Shreveport may not enforce Section 102.1 against a licensed journeyman plumber who engages in the plumbing business to the extent of repairing a leaking lavatoy.

The demolition of plaintiff's apartment complex was not reasonably related to some objective concerned with public health simply because ***the Parish of Jefferson issued to plaintiff a building permit, and, thereby admitting that something other than demolition was reasonable.***

The Supreme Court of Louisiana has further held, in ***Coliseum Square Association v. City of New Orleans,*** **544 So.2d 351 (La. 1989).**

> It is a violation of good faith to the public, and to those who acquired property in reference to the plan of a city with a view to the enjoyment of the use thus publicly granted, to afterwards appropriate a street to private uses. ***City of Baton Rouge v. T.J. Bird, Sheriff, et al,*** 21 La.Ann. 244 (1869). Also see De Armas, et al. v. mayor, etc. of New-Orleans, 5 La. 132 (1833), dismissed for lack of jurisdiction 34 U.S. (9 Pet.) 224, 9 L.Ed. 109 (1835).

Plaintiff in the case at bar acquired property in reference to the plan of the Parish of Jefferson as described by Hon. Michael J. Yenni, Parish President, in his letter to HUD dated December 14, 1990. The demolition of its property was a violation of good faith since, Mr. Connick proceeded to have plaintiff's buildings demolished having arrived at that conclusion arbitrarily and capriciously, ***completely contrary to substantiated competent evidence, i.e., the building permit, JPHA's contract with plaintiff, letters from the parish president, the council resolution and HUD's approval.*** The Supreme Court in ***Coliseum,*** supra, defined arbitrary and capricious as:

> Generally, "capriciously" has been defined as a conclusion of a commission when the conclusion is announded with no substantial evidence to support it, or a conclusion contrary to substantiated competent evidence or of the proper weight thereof. Favrot v. Jefferson Parish Council, 470 So.2d 286 (La. App. 5th Cir. 1985); Torrance v. Caddo Parish Police Jury, supra.

Part IV.
Parish Administrative Officials Had No Discretion

The Supreme Court of Louisiana applied its interpretation of the discretionary function exception in two recent cases.

In ***Rick v. State, Dept. of Transp. and Development*, 630 So.2d 1271, (La. 1994)**, the Supreme Court made the following analysis:

> This Court considered the discretionary function exception to state liability in ***Fowler v. Roberts***, 556 So.2d 1 (La.1989). Judicial inteference in executive actions involving public policy is restrained by the exception. The Louisiana statute immunizes public entities like the DOTD from liability for policy-based decisions.
>
> A two-step analysis determines whether the exception applies. ***Berkovitz by Berkovitz v. U.S.***, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988). First, a court must determine whether the action is a matter of choice. If no options are involved, the exception does not apply. If the action involves selection among alternatives, the court must determine whether the choice was policy based. Decisions at an operational level can be discretionary if based on policy. ***U.S. v. Gaubert***, 499 U.S. 315, 111 S. Ct. 1267, 113 L.Ed.2d 335 (1991).
>
> The DOTD argues that whether a particular crossing is selected for upgrade is a matter of discretion protected by the exception. Selecting one crossing for upgrade in preference to another equally

deserving crossing would probably be a policy decision. However, this crossing was not selected for earlier upgrade because the DOTD negligently assigned it a low hazard index. It the DOTD had examined its own data, it would have assigned a much higher hazard index to this crossing. Using 1974 data to formulate a 1986 hazard index was not a policy decision. It was operational negligence on the part of the DOTD. this operational negligence and the resulting low hazard index postponed the improvement of this crossing.

After the crossing was selected for upgrade in 1986, there was further delay which the DOTD attributes to the railroad's failure to respond. The erroneous hazard index submitted to the railroad may have contributed to the delayed reaction of the railroad. The DOTD admitted that it made no effort to obtain a timely response and did not calendar or monitor the railroad's reaction. The DOTD does not ascertain that a railroad has even received a priority notice. The railroad prepares the upgrade plans and estimates under an unknown timetable. These plans and estimates were received from the Illinois Central Railroad on September 2, 1988, after Mrs. Rick's accident. ***The DOTD's failure to inquire about the status of the crossing upgrade constituted further operational negligence. The failure was not shown to be based on any policy considerations.*** Compare Simeon v. Doe, 618 So.2d 848 (La. 1993). (emphasis added)

The Parish of Jefferson introduced evidence of its own "operatioinal negligence" when it proved that it had knowledge of all the fires that occurred in 1988-89, a period

of two years, and did nothing toward proceeding to declare the property dangerous; instead, having such knowledge, the Parish of Jefferson placed nothing in the public records to alert plaintiff, an innocent purchaser, that the apartment complex was a target of its police power objective to protect and promote the lives, health, morals, comfort, and general welfare of its people as a whole.

The Supreme Court of Louisiana further classified "delay" as operational negligence in ***Archon v. Union Pacific R.R.*, 657 So.2d 987, (La. 1995),** thusly:

> Having found that DOTD was negligent in failing to install adequate warning signs or devices at the Van-Ply crossing and that this breach was a cause-in-fact of Archon's death, we now consider DOTD's assertion that the discretionary function exception of LSA-R.S. 9:2798.1 operates to shield it from liability.
>
> **LSA-R.S. 9:2798.1** provides immunity from liability for "public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policy-making or discretionary acts when such acts are within the course and scope of their lawful powers and duties." We have adopted a two-step test for determining when this exception applies. See ***Fowler v. Roberts*,** 556 So.2d 1, 15 (La.1989) (citing ***Berkovitz v. Berkovitz v. United States*,** 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988)). First, the court must determine whether the government action is a matter of choice. If it is not (because some statute,

regulation, or policy prescribes a specific course of action to follow), then the exception does not apply and there is no immunity. On the other hand, if the action does involve an element of choice or discretion, then the court must determine "whether that discretion is the kind which is shielded by the exception, that is, one grounded in social, economic or political policy." Id. Only those actions based on public policy are protected by the statute. Id.

In evaluating DOTD's actions in this case, we are mindful of dicta in Rick that the selection of one crossing in preference to another equally deserving crossing is more likely a policy decision and thus, by implication, shielded under the discretionary function exception. In that same case, however, we deemed as operational negligence, and thus not protected, DOTD's negligence in failing to obtain a timely response from the railroad regarding the upgrade plans after the site had been selected.

DOTD argues that in the instant case no such operational negligence occurred as the upgrade process was not unduly delayed. (FN18) While we agree with DOTD's contention that it proceeded efficiently through the federal approval process once the Van-Ply crossing was finally selected for improvement, we refuse to extend immunity to DOTD's failure to install flashing lights (or provide some other more adequate warning device) after it had acknowledged in 1983 that such action was required. DOTD's failure to follow through on, or implement, its mandate to install these warning devices is operational negligence not protected by

LSA-R.S. 9:2798.1. (FN19) We agree with the California Supreme Court observation that "[a] governmental entity may not, ostrich-like, hide its head in the blueprints, blithely ignoring the actual operation of the plan. "*See* ***Baldwin v. State,*** 6 Cal.3d 424, 99 Cal. Rptr. 145, 491 P.2d 1121, 1127 (1972). In Rick, we criticized and deemed as operational negligence DOTD's failure to monitor the railroad's approval of the planned upgrade because it resulted in delayed implementation of the decision to improve the crossing. DOTD's fault in this case lies not in any policy decision, as that decision had already been made, but in its ignoring the numerous complaints, as well as its own findings, regarding the hazardous nature of the Van-Ply crossing and the obvious need for, and its promise to install, active signalization.

DOTD has not suggested any social, economic, or political policy that was the basis for its failure to comply with its own mandate; rather, DOTD appears to have simply forgotten the obligation it had taken on, and it provides no explanation for that lapse. ***Nor does it attempt to explain why it ignored the repeated letters it had received as early as December, 1987 requesting investigation of the crossing.*** As we noted to Fowler, "[w]hen the government acts negligently for reasons unrelated to public policy considerations, it is liable to those it injures." ***Fowler v. Roberts,*** 556 So.2d 1, 15-16 (La.1989). Thus, the decision whether or not to require flashing lights at the crossing might have been one for which DOTD had no liability because tht decision necessarily involves the exercise of governmental discretion. On the other hand, the lengthy delay of over six years in effectuating a

> decision already made is not a discretionary call that qualifies for similar treatment.(**emphasis added**)

Likewise, the Parish of Jefferson introduced evidence of complaints about fires but made no attempt to explain why it did nothing during 1988-89 to protect the public, including innocent purchases, like Vicari Contractors, Inc., from the consequence of fire. Such a consequence of fire included the use of complaints of fires to justify targeting property for demolition. (**See Record: Volume III, pp. 487 *ff***)

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v.

ARGUMENT ON ASSIGNMENT OF ERRORS 6 AND 7

The affidavits which are filed and the exhibits which are referred to in plaintiff's opposition to defendant's motion for summary judgment clearly show fraud and ill practice regarding the conduct of Mr. Paul Connick, Sr., among other employees of the Parish of Jefferson, with respect to the method of enforcement pursued by Mr. Paul Connick, Sr. The petition to annul the judgment should not have been dismissed.

As an example, the affidavit of Mr. Paul Connick, Sr. filed in these proceedings on March 26, 1993 at 4:35 p.m. in statement number 14 recites that Judge Porteous gave the following order to plaintiff/appellant:

> Now, ya'll agreed to this and at ten o'clock thirty days from this date, the Parish can go in and tear these buildings down unless Vicari does what he says what he's going to do. I don't want to see you back in this court.

Mr. Paul Connick, Sr. goes on to attribute the following statement to Judge Porteous:

> Judge Porteous specifically told Vicari:
>
> You don't come back to me — you've got your orders to do what you've got to do.

The transcript of the proceedings before Judge Porteous which were held on December 15, 1993 and which are attached to plaintiff's opposition, (**Record: Vol. 1, p. 175-176**) specifically pages 14 and 15, show that judge Porteous advised counsel present that he had no recollection of making these above referenced statements attributed to him by Mr. Connick; and, then on page 15, Mr. Anzelmo, then the attorney for the Parish of Jefferson, frankly states that it is he, Mr. Anzelmo, who made the statement and that he was in error in doing so.

Mr. Paul Connick, Sr., affiant, certainly knew that the statement which he attributed to Judge Porteous was in error but, nevertheless, signed that statement under oath. Clearly, these transcripts and affidavits justify a cross-examination of Mr. Paul Connick, Sr., for impeachment purposes as well as credibility on the following issues: (**See Record: Vol. 1, 97 CA 168, pp. 162-175**)

1. Did Mr. Connick purger himself in signing that affidavit and in doing so attempt to create a justification which did not exist for the Parish Of Jefferson to demolish plaintiff's property?

2. Under what authority did Mr. Connick proceed

to destroy plaintiff's property as well as his conduct in doing so since the transcript of the agreement, as it has been identified by both the trial Court and the Court of Appeals, shows that the Plaintiff intended that he be given further notice even though it might not be recited in the judgment? **(Exhibit Vicari #10)**

3. Was the conduct of Mr. Paul Connick, Sr. in conformity with the ordinance of the Parish of Jefferson. Plaintiff strongly disputes that Mr. Connick's conduct complied with the ordinance of the Parish of Jefferson and, this issue of fact is reason enough for the Petition to Annul the judgment to survive.

vi.

ARGUMENT ON ASSIGNMENT OF ERROR NO.8

LSA - C.E. Art. 615 entitled Exclusion of Witnesses provides:

> **A. As a matter of right; exceptions.** On its own motion the court may, and on request of a party the court shall order that the witnesses be excluded from the courtroom or from a place where they can see or hear the proceedings, and refrain from discussing the facts of the case with anyone other than counsel in the case. In the interests of justice, the court may exempt any witness from its order of exclusion. However, this article does not authorize exclusion of:
>
> * * *

(2) A single officer or single employee of a party which is not a nataural person designated as its representative or case agent by its attorney.

* * *

Counsel for plaintiff/appellant at the commencement of trial moved for sequestration of witnesses. A colloquy ensued wherein the judge allowed both Messrs. Connick and Butler to be qualified as representatives of Jefferson Parish over the specific objection of counsel for plaintiff/appellant. Here, Messrs. Connick and Butler were material witnesses. Either of them were qualified representatives of Jefferson Parish; and, pursuant to **LSA - C.E. Art. 615 (2)** it is a mandatory requirement to have one remain leaving the other susceptible to plaintiff's/appellant's request for sequestration.

While undersigned counsel did state the word "okey" after the ruling of the trial judge, that was merely stated to acknowledge the ruling of the trial judge and not an acquiescence to the ruling. Undersigned counsel clearly stated his objection to the court's ruling during the colloquy which resulted in that ruling. Under these conditions, plaintiff/appellant did not receive a fair trial according to proper judicial proceedings.

CONCLUSION

The Parish of Jefferson is liable to plaintiff for the demolition of its apartment complex caused by the operational negligence of its administrative officers.

Additionally, plaintiff did not receive proper notice through its designated agent for service of process and, as such, denied plaintiff its fundamental right to due process of law. ***Housemaster Corp. v. City of Kenner,*** 374 So.2d 1240 (La. 1979) **(See testimony of Barbara Vicari. (Record: Vol. 3, p. 654, lines 6-32; p. 655, lines 1-8)**

Respectfully submitted,

/s/ Stephen J. Caire

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Vicari Contractors, Inc.

VERIFICATION

STATE OF LOUISIANA

PARISH OF JEFFERSON

BEFORE ME, the undersigned Notary Public, duly commissioned and qualified in and for the parish and state aforesaid,

PERSONALLY CAME AND APPEARED:

STEPHEN J. CAIRE

who being by me first duly sworn, did depose and say that he is the attorney for Relator herein and that all of the allegations of fact contained in the foregoing Petition for Supervisory Writs are true and correct to the best of his knowledge, information and belief; and that he has delivered a copy of the foregoing petition to the Clerk, Court of Appeal, Fifth Circuit, State of Louisiana, Courthouse, Gretna, Louisiana, and that he has served a copy of the foregoing brief served upon the Parish of Jefferson through their attorneys of record *Mr. Daniel A. Ranson and Michael D. Peytavin,* (Attorney for Defendant/Appellee, The Parish of Jefferson), 401 Whitney Avenue, Gretna, Louisiana 70056, (504) 362-2466, by placing a copy of same in the United States Mail, First Class postage pre-paid on this 17th day of December, 1997.

Harvey, Louisiana on this 17th day of December, 1997.

/s/ Stephen J. Caire
STEPHEN J. CAIRE

SWORN TO AND SUBSCRIBED
BEFORE ME ON THIS 17th DAY OF
December, 1997,

/s/ Illegible
NOTARY PUBLIC

APPENDIX B

Agreement/Contract Number:

U.S. DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT, SECTION 8
HOUSING ASSISTANCE PAYMENTS PROGRAM

SECTION 8 CERTIFICATE PROGRAM
PROJECT BASED AGREEMENT

PART I
AGREEMENT TO ENTER INTO HOUSING ASSISTANCE
PAYMENT CONTRACT

This Agreement to Enter Into Assistance Payments Contract (* Agreement *) is between the Housing Authority of the Parish of Jefferson (* PHA *),
and Vicari Contractors, Inc.
(* owner *).

The owner agrees to complete the rehabilitation of unit(s) in accordance with the work write-up attached as Exhibit B. When the rehabilitation is completed, the (owner and the PHA will enter into a Housing Assistance Contract (*Contract*) which will allow the owner to receive housing assistance payments from PHA on behalf of eligible lower-Income Families(*Families*) so that they may afford the unit(s). The PHA has executed an Annual Contributions Contract (*ACC*) with HUD by which HUD agrees to provide funds to the PHA to make these housing assistance payments.

1.1 *Significant Dates: Contents of Agreement.*

A. *Effective date of Agreement: 5-30-91* .

B. *Date of Comencement of work.* The date for comencement work (see Section 1.41A) is not later than 60 calendar days after the effective date of this agreement.

C. *Time for Completion of Work.* The date for completion of the work (see Section 1.411) is not later than 250 calendar days after the effective date of this Agreement.

D. *Contents of the Agreement.* This agreement consists of Part I, Part II , Fors HUD 52521 B (if applicable, see Section 1.2) , and the following exhibits:

Exhibit A: The approval Owner's proposal.

Exhibit B: The work write-up.

Exhibit C: Identification of units be size, address, and applicable Contract Rents.

Exhibit D: The Housing Assistance Payments Contract (* Contract*) complete with respect to the Agreement/Contract number, the identification of PHA and Owner, and Exhibit B.

Exhibit E: The schedule of completion of stages, if applicable. (This exhibit should identify the units in each stage).

Additional Exhibits: (Specify additional exhibits, such as Davis-Bacon Wage Rate Schedule, If any, If none, insert "None".)

This agreement, including the exhibits, is the entire Agreement between the RHA and the Owner.

1.2 *Applicability of Part II Provisions.*

2.1 *Training, Employment, and Contracting Opportunities for business and Lower Income Persons.* (Applies if the total of ____tract Rents for all units under the proposed contract, over its maximum (_____ if the contract, is more than $500,000 or $2,778 per month.)

( ) Applicable (✓) Not Applicable

2.2. *Equal Employment Opportunity.* (Applies only to construction contracts of more than $10,000.)

( ) Applicable (✓) Not Applicable

2.3 *Clean Air Act and Federal Water Pollution Control A-__.* (Applies if the total of Contract Rents for for all units under the proposed Contract, over the maximun term of the contract, is more than $100,000 or $550 per month.)

( ) Applicable (✓) Not Applicabale

2.8, and 2.10 *Labor Standards Requirements.* (Section 2.4, 2.* and 2.10 only when this Agreement covers nine or more units.) 2.4 HUD-Federal Labor Standards _____ions; 2.8 Wage (_____ and A.1_____ 2.1____Evidence of Unitial Completion:

((Applicable (✓) Not Applicable

2.11 *Flood Insurance.* _____

_____

( ) Applicable (✓) Not Applicable

1.3 *PHA Assurance to Owner.*

The PHA warrants that it is a "Public housing agency" as defined in the U.S. Energy Act of 19____, that if authorized to execute an Agreement in accordance with HUD Regulations and requirements and that is ____ an Act with HUD.

1.4 *Schedule of Completion.*

A. *Timely Performance of work.* The Owner agrees to begin work no later than the date for commencement of work as stated in Section 1.1(9). In the event the work is not commensed, diliquently continued and competed as required under this Agreement, the PHA may terminate this agreement: or take other appropriate action. The Owner agrees to report promptly to the PHA the date work is commenced and furnish the PHA with progress reports as required by the PHA.

B. *Time for Completion.* All work must be completed no later than the end of the period stated in Section 1.1 (C). Where completion in stages is provided for, work related to units included in each stage shall be completed by the stage completion date in Exhibit E, and all work on all stages must be completed no later than the end of the period stated in Section 1.1(C).

C. *Delays.* in the event there is a delay in the completion due to unforeseen factors beyond the Owner's control as determined by the PHA, the PHA agrees to extend the time for completion as appropriate.

1.5 *Rehabilitation Period.*

A. *Contract Rents.* The initial Contract Rent for each unit must be determined in accordance with HUD requirement. The Contract Rents stated in Exhibit C will be the initial Contract Rents specified in the Contract unless decreases are made by the PHA (1) in accordance with paragraph (B) of this section or (2) to correct PHA errors in determination of initial Contract Rents in accordance with HUD requirements. The initial Contract Rents listed in Exhibit C of this Agreement may not increase for any reason, including changes in rehabilitation work.

B. *Changes in Rehabilitation Work.* The Owner must obtain prior PHA approval for any change from the work specified in Exhibit B which would alter the design or quality of the rehabilitation. The PHA may disapprove any changes requested by the Owner. PHA approval of changes may be conditioned on a reduction of Contracts Rents in the amount determined by the PHA. If the Owner takes any changes without prior PHA approval, the PHA may reduce Contract Rents in the amount determined by the PHA, and may require the Owner to ready any deficiencies prior to, and as a condition for acceptance of the units.

C. *List of Vacancies.* Sixty days prior to the scheduled completion of the rehabilitation (Where completion in stages is provided, sixty days prior to completion of rehabilitation on each stage), the Owner agrees to notify the PHA in writing of any unit(s)

expected to be vacant at the anticipated effective date of the Contract. The PHA agrees to refer to the Owner appropriate-sized families from the PHA waiting list. When the Contract is executed, the Owner agrees to notify the PHA which units are vacant.

D. *Limitation on Requiring Tenants to Move.*

1. The Owner agrees that, during the period from submission of the Owner's proposal to the PHA until completion of the work pursuant to this Agreement, lawful residential tenants of the property (building or complex) have not been and must not be required to move from the property except in accordance with the following:

(a) Tenants may not be required to move permanent from the property.

(b) Tenants may not be required to move temporarily from the property unless:
(1.) The tenants have received adequate, advance written notice and appropriate advisory services.

(2.) deceit, safe, and sanitary temporary housing is available.

(3.) the temporary relocation period will not exceed 12 months, and

(4.) the Owner will reimburse the tenants for reasonable out-of-pocket expenses ' as

determined in accordance with HUD requirements) incurred in connection with the temporary relocation.

2. The provisions of paragraph (D(I) do not apply:

(a) to tenants of the property who comence occupancy after submission of the Owner's proposal to the PHA, if the Owner gives the tenants, prior to commencement of occupancy, adequate notice of impending rehabilitation and possibility that the tenant may be required to move from the property, or

(B) to a termination of tenancy for serious or repeated violation of the terms and conditions of the lease; violation of applicable Federal, State, or local law; or other good cause. (For this purpose, good cause does not include expiration of the lease term or a termination of tenancy because of the Owner's participation in the Section 8 Project Based Certificate Program.)

E. *Inspections.* The PHA will inspect during rehabilitation to insure that work is proceding on schedule, is being accomplished with the terms of the Agreement, and meets the levels of workmanship and materials specified in the work writeups.

1.6 *Work Completion. Work Completion.*

A. *Conference with Exhibit B.* The completed work must

be in accordance with Exhibit B. The owner is solely responsible for completion of the work.

B. *Notification of Completion.* The owner agrees to notify the PHA when the work is completed and to submit to the PHA the items described in paragraph (C) of this section.

C. *Evidence of Completion.* When the work is completed, the Owner must provide the PHA with the following:

1. A certificate of occupancy and/or official approvals as requird by the locality.

2. A certification by the Owner that:

(a) the work has been completed in accordance with the requirements of this Agreement;

(b) The unit(s) is in good and tenantable condition;

(c) There are no defects or deficiencies in the work except for items of delayed completion which are minor or which are incomplete because of weather conditions and, in any case, do not preclude or affect occupancy:

(d) The unit(s) has been rehabilitated in accordance with applicable zoning, building, housing and other codes, ordinances or

regulations, as codified by any waiver obtained from appropriate officials;

(e) any unit built prior to 1978 is in compliance with applicable HUD Lead Based Paint regulations; and

(f) If Labor Standards Requirements are applicable, the Owner has complied with the requirements of Section 2.10 of this Agreement.

D. *Review and Inspection.*

1. After receipt of the evidence of completion, the PHA agrees to review the evidence of completion for compliance with paragraph (C) of this section and, if applicable, Section 2.10

2. A PHA representative must inspect the unit(s) to be assisted to determine that the work has been completed in accordance with the Agreement. If the inspection discloses defects or deficiencies, the inspector will report these with sufficient detail and information for purposes of paragraph (f) of this section.

E. *Acceptance.* If the PHA determines from the review and inspection that the units meet the Housing Quality Standards (or other standards approved by HUD) for the program and the work has been completed in accordance with the Agreement, the

unit(s) must be accepted.

F. *Acceptance Where Defects or Deficiencies Reported.* If the work is not acceptable, the following shall apply:

1. If there are any items of delayed completion which are minor items or which are incomplete because of weather conditions and in any other case which do not preclude or affect occupancy, and all other requirements of the Agreement have been set, the unit(s) may be accepted. The Owner shall deposit in escrow with the PHA funds in an amount the PHA determines to be sufficient to assure completion of the delayed items, and shall execute a written agreement with the PHA (in the form prescribed by the PHA) which specifies the schedule for completion of the items. If the items are not completed within the agreed time period, the PHA may terminate the Contract or exercise other rights under the Contract.

2. If other deficiencies exist, the PHA must determine whether and to what extent the deficiencies are correctable, and whether the Contract Rents and term of the Contract should be reduced. The Owner must be notified of the PHA's decision.

G. *Notification of Nonacceptance.* If the PHA determines that, based on the review of the evidence of

completion and inspection, the units cannot be accepted, the Owner must be promptly notified of this decision and the reasons.

H. *Completion in Stages.* Where completion in stages is provided for, the procedures of this section shall apply to each stage.

1.7 *Execution of Housing Assistance Payments Contract.*

A. *Time and Execution.* Upon acceptance of the unity by the PHA, the Owner and the PHA agree to execute the Contract.

B. *Completion in Stages.* Where completion in stages is provided for, the number and types of units in each stage, and the Contract Rents for such units, shall be separately shown in Exhibit A of the Contract for such stage. Upon acceptance of the first stage, the Owner will execute the Contract and signature block provided in the Contract for that stage. Upon acceptance of each subsequent stage, the Owner will execute the signature block provided in the Contract for such stages.

C. *Form of Contract.* The terms of the Contract shall be as provided in Exhibit D of this Agreement. Prior to execution by the PHA or the Owner, all blanks in the Contract shall be completed by the PHA. There will be no change in the terms of the Contract other than as provided in this Agreement.

1.8 *Cooperation in Equal Opportunity Compliance Reviews: Nondiscrimination.*

A. The Owner and the PHA agree to cooperate with HUD in the conducting of the compliance review and complaint investigatiaons pursuant to all applicable civil rights statutes, Executive Orders, and rules and regulations.

B. 1. In the carrying out of the obligations under this Agreement, the Owner will not discrimninate against any employee or applicant for employment because of race, color, creed, religion, sex, handicap or national origin. The Owner will take affirmative action to insure that applicants that are employed, and employees are treated during employment, without regard to their race, color, creed, religion, sex, handicap or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

2. The Owner to post in a conspicuous places, available to employees and applicants for employment, notices to be provided by HUD setting forth the provisions of this nondiscrimination clause. The Owner will in all solicitations or advertisements for employees placed bay or on behalf of the Owner state that all qualified applicants will receive consideration for employment without regard to race, color, creed, religion, sex, handicap or national origin. The Owner will incorporate the foregoing requirements of this paragraph (B) in all of its con-

tracts for project work, except contracts for standard commercial supplies or raw materials, and will require all of its contractors for such work to incorporate such requirements in all subcontracts for project work.

1.9 *PHA and Owner Relation to Third Parties.*

A. *Nonperformance of Contractor.* The PHA has not assured any responsibility or liability for the performance of any contractor, subcontractor or supplier, whether or not listed by the PHA as a qualified contractor or supplier under the program. The selection of a rehabilitation contractor, subcontractor or supplier is the sole responsibility of the Owner, and the PHA has no involvement in any such relationship.

B. *Injury Resulting from Rehabilitation.* The PHA has not assured any responsibility for or liability to any person including a resident of the unit undergoing rehabilitation, injured as a result of the rehabilitation or as a result of other action or failure to act by the Owner.

C. *Legal Relationship.* The Owner is not the agent of the PHA, and this agreement does not create or affect any relationship between the PHA and any lender to the Owner or any suppliers, employer, contractors or subcontractors used by the Owner in the implementation of the Agreement.

D. *Exclusion of Third Party Claims.* Nothing in this agreement shall be construed as creating any right

of a Family or other third party (other than HUD) to enforce any provision of this Agreement or the Contract or to assert any claim against HUD, the PHA or the Owner under the Agreement or the Contract.

E. *Exclusion of Owner Claims Against HUD.* Nothing in this agreement shall be construed as creating any right of the Owner to assert any claim against HUD.

1.10 *Rights of HUD if PHA Defaults Under Agreement.*

If HUD determines that the PHA has failed to comply with this Agreement, or has failed to take appropriate action, to HUD's satisfaction or as directed by HUD, for enforcement of the PHA's rights under this agreement, HUD may assure the PHA's rights and obligations under this Agreement, and may perform the obligations and enforce the rights of the PHA under the Agreement. HUD will, if it determines that the Owner is not in default, pay Annual Contributions for the purpose of asking housing assistance payments with respect to the dwelling units(s) under this Agreement for the duration of the Contract.

1.11 *Interest of Members, Officers, or Employees of PHA, Members of Local Governing Body, or Other Public Officials.*

No present or former member or officer of the PHA (except tenant-commissioners), no employee of the PHA who fomulates policy or influences decisions with respect to the Section 8 Program, and no public official or member of a governing body or State or local

legislator who exercises functions or responsibilities with respect to the Section 8 Program, shall have any direct or indirect interest, during his or her tenure or for one year thereafter, in this Agreement or the Contract or in any proceeds or benefits arising from the Agreement or Contract. This provision may be waived by HUD for good cause.

1.12 *Interest of Member of or Delegate to Congress.*

No member of or delegate to the Congress of the United States of America or resident commissioner shall be admitted to any share or part of this Agreement or to any benefits which may arise therefrom.

1.13 *Assignment of the Agreement or Contract or Interest in it.*

A. The Owner agrees that the Owner has not made and will not make any transfer in any form, including any sale or assignment of this Agreement or the Contract or the property without the prior written consent of the PHA. A change in ownership in the Owner, such as a stock transfer or transfer of the interest of a limited partner, is not subject to the provisions of this section. Transfer of the interest of a general partner is subject to the provisions of this section.

B. The PHA will give its consent to a transfer of the Agreement or Contract pursuant to paragraph (A) of this section if the transfree agrees in writing (in a form acceptable to the PHA) to comply with all the terms of the Agreement and Contract, and if the transferee is acceptable to the PHA.) The PHA's

criteria for acceptance of the transferee must be no more restrictive than for initial acceptance of any Owner under the Program at the time of the Owner's request.

C. If an Owner is proposing to pledge the Agreement or HAP Contract as a security for financing, the Owner must submit the financing documents to the PHA for approval. In determing the approvability of a pledge arrangment, the PHA must review the documents submitted by the Owner to ensure that:

1. The financing documents do not purport to pledge or give greater rights or payments to any party against the PHA than are provided to the Owner under the Agreement or HAP Contract and do not contain any requirements inconsistent with the Agreement or HAP Contract:

2. The PHA is not a party to any of the financing (_____than those already specified under the Agreement of HAP Contract) in connection with the _____.

3. No moderation or alteration is proposed or sale of the Agreement of HAP Contract.

1.14 *Owner Assurance to the PHA.*

A Contractor Selection. The Owner must select a _____The owner agrees to require from each prospective contractor a certification that neither

the _____ debarred, suspended, proposed for deb_____, declared _____or _____ in contract: by the Comptroller General or any Federal department or agency. The Owner _____contracts to, otherwise engage the services of, or fund any contractor that does not provide this certification.

B. *Rehabilitation Financing.* The owner agrees not to rehabilitate the units with assistance under the U.S. Housing Act of 1937 (e.g., public housing and rental rehabilitation program, housing development _____ tax except lands or other Section 8 programs) or the flexible subsidy program. The owner warrants that the units were not hehabilitated with assistance under the U.S. Housing Act of 1937 in the five years before execution of the Agreement.

C. *Ownership.* The Owner warrants that the property to be rehabilitated under this Agreement is not owned by the PHA, or an entity controlled by the PHA.

1.15 *Other Federal Requirements.*

The Owner shall comply with the requirements of the following, where applicable:

A. Executive Orders 12432, Minority Business Enterprise Development, and _____, _____ a _____ _____ business Enterprise Policy.

B Executive Order 11625, Prescribing Additional Arrangements for developing and Certifying a National Program for Minority Business Enterprises.

C. 24 CPR Part 24, Debarrent, Susension, and Limited Denial of Participation.

1.16 *HUD Requirements.* The Agreement and the contract shall be interpreted and implemented in acceptance with HUD requirements.

Termination of Contract. This Agreement or the Contract can be terminated upon atleast 10 days written notice to the _____ by the PHA or HUD if the PHA or HUD determines that the Contract Units are not cpmpleted in accordance with the PHA's written selection policy or that the Contract Units did not initialy ____ the HUD eligibility requirements.

PHA :Housing Authority of the Parish of Jefferson Owner ____ Vicari Contractors Inc.

By /s/ Barry Bordelon By /s/ Illegible

Barry Bordelon, Chairman Pres.

Official Title

Date 5/30/91 Date 5/30/91

Warning: 18 U.S.C. 1001 provides, among other things, that whereas knowingly and willingly _____ _____ _____ containing any false, fictitious, or fraudulent statement ____ _____ ____ ____ within the jurisdiction of any dapartment or agency of the United States, shall be fined not more than $10,000 or imprisioned for not more than five years or both.